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No. 93-1784

In the Supreme Court of the United States

OCTOBER TERM, 1993

JOHN PATTERSON, ET AL., PETITIONERS

v.

NEWSPAPER AND MAIL DELIVERERS UNION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the standards for modifying consent decrees set forth in *Board of Education of Oklahoma City Public Schools* v. *Dowell*, 498 U.S. 237 (1991), and *Rufo* v. *Inmates of Suffolk County Jail*, 112 S. Ct. 748 (1992), apply to cases involving non-governmental defendants.

2. Whether the termination of the consent decree in this case was consistent with *Dowell* and *Rufo*.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	6
Conclusion	12

TABLE OF AUTHORITIES

Cases:

Board of Education of Oklahoma City Public Schools v. *Dowell*, 498 U.S. 237 (1991)	4, 9, 11
Epp v. *Kerrey*, 964 F.2d 754 (8th Cir. 1992)	10
Freeman v. *Pitts*, 112 S. Ct. 1430 (1992)	10, 11
Hendrix, In re, 986 F.2d 195 (7th Cir. 1993)	10
Local 93, Int'l Ass'n of Firefighters v. *City of Cleveland*, 478 U.S. 501 (1986)	7
Local 28, Sheet Metal Workers' Int'l Ass'n v. *EEOC*, 478 U.S. 421 (1986)	7
Lorain NAACP v. *Lorain Bd. of Educ.*, 979 F.2d 1141 (6th Cir. 1992), cert. denied, 113 S. Ct. 2998 (1993)	10
Rufo v. *Inmates of Suffolk County Jail*, 112 S. Ct. 748 (1992)	4, 9, 11
United States v. *Swift & Co.*, 286 U.S. 106 (1932)	4, 9
W.L. Gore & Associates v. *C.R. Bard, Inc.*, 977 F.2d 558 (Fed. Cir. 1992)	10

Statute:

Civil Rights Act of 1964, Tit. VII, 42 U.S.C. 2000e *et seq.*	2, 6, 7

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 13 F.3d 33. The opinion of the district court (Pet. App. 100a-121a) is reported at 797 F. Supp. 1174.

JURISDICTION

The judgment of the court of appeals was entered on December 20, 1993. A petition for rehearing was denied on February 7, 1994. Pet. App. 13a-14a. The petition for a writ of certiorari was filed on May 9, 1994 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Newspaper and Mail Deliverers' Union (NMDU) controls access to jobs in the newspaper delivery industry in the New York City area. Pet. App. 2a. From 1901 until 1952, NMDU was an all-white union that limited its membership to the first-born, legitimate sons of union members. *Id.* at 2a, 20a. In 1952, with the cooperation of the area's newspapers and publishers, NMDU adopted a series of work rules that theoretically opened up employment opportunities to the entire labor force. *Id.* at 2a-3a, 20a-21a. In practice, however, friends and relatives of union members continued to receive favored treatment and minorities continued to be excluded from industry jobs. *Id.* at 21a. As of 1973, minorities constituted 30% of the qualified labor pool, but only 2% of the deliverers. *Id.* at 4a, 21a-22a.

In that year, minority deliverers and the Equal Employment Opportunity Commission (EEOC) filed suit against NMDU and the newspapers and publishers in the New York City area (respondents). They alleged that the 1952 system perpetuated discrimination against minority workers in violation of Title VII of the Civil Rights Act of 1964. Pet. App. 3a. In 1974, after the case was tried but before the district court issued a decision, the parties entered into a settlement agreement that was incorporated into a consent decree. *Id.* at 3a-4a.

The decree contained four operative components. First, it permanently enjoined respondents from discriminating against minorities. Pet. App. 4a. Second, it provided for the appointment of an Administrator to implement the provisions of the agreement. The Administrator was to have a five-year term, which could be extended "as the Court may direct." *Ibid.* Third, the agreement established "a minimum goal of 25% minority

employment in the industry . . . by June 1, 1979." *Id.* at 4a-5a. Specific hiring ratios were established to facilitate the achievement of that goal. *Id.* at 5a. Finally, the decree contained specific provisions related to the hiring process, such as the establishment of application procedures. *Ibid.* The purpose of the decree was "to correct the * * * statistical imbalance [in the industry], to remedy and eradicate its effects, and to put minority individuals in the position they would have occupied had the * * * statistical imbalance not existed." *Id.* at 4a.

By 1979, the year the 25% goal was to have been met, minorities constituted only 13.3% of those employed in the industry. Pet. App. 5a. In that year, the court extended the Administrator's term for another five years. *Ibid.* In 1984, the court extended the Administrator's term indefinitely. *Ibid.*

2. In 1985, respondents moved to vacate the decree on the ground that the 25% goal had been attained. Pet. App. 5a. The court deferred consideration of the motion until further evidence was produced that the goal had been met industry-wide. *Id.* at 6a. In 1988, based on preliminary evidence on that issue, the court suspended the decree's hiring ratios pending the resolution of the motion to vacate. *Ibid.* In 1991, the Administrator verified that the industry had achieved 25% minority employment, and the district court scheduled a hearing on the motion to vacate. *Ibid.*

Petitioners opposed vacation of any part of the decree. Pet. App. 6a. The EEOC did not oppose eliminating the affirmative action provisions or the Administrator, but it sought to retain the permanent injunctions against discrimination and several other provisions designed to ensure nondiscriminatory hiring. *Ibid.*

The district court granted respondents' motion to vacate the decree in its entirety. The court held that "[t]he Settlement Agreement is one cohesive document the goal of which was to increase minority employment in the industry to 25%." Pet. App. 116a. Because that goal has been accomplished, the court concluded, "the Decree has served its purpose, and its vacation, consistent with the intent which accompanied its entry, is appropriate." *Id.* at 117a.

In reaching that conclusion, the court rejected the argument that under *United States* v. *Swift & Co.*, 286 U.S. 106 (1932), only a "grievous harm" evoked by new or unforeseen conditions could justify vacating a consent decree. Pet. App. 107a. The court held that *Board of Education of Oklahoma City Public Schools* v. *Dowell*, 498 U.S. 237 (1991), and *Rufo* v. *Inmates of Suffolk County Jail*, 112 S. Ct. 748 (1992), had established a more flexible standard, permitting a decree to be vacated when its essential purpose has been achieved. Pet. App. 107a-109a.

The court also rejected the argument that continuing discrimination by respondents precluded vacating the decree. The court held that even assuming that respondents "have continued to violate the Consent Decree and that discrimination remains prevalent in the industry, such arguments are not relevant to defendants' application for vacation of the Consent Decree." Pet. App. 114a. The court concluded that "the only fact relevant to the issue of whether to terminate the Consent Decree [is] whether the 25% minority employment goal has been achieved." *Id.* at 115a.

3. The court of appeals affirmed. Pet. App. 1a-12a. The court held that the district court had properly evaluated the motion to vacate under the flexible standard of *Dowell* and *Rufo*, rather than under *Swift's*

grievous harm standard. *Id.* at 7a-10a. The court concluded that the flexible standard "is not limited to cases in which institutional reform is achieved in litigation brought directly against a governmental entity." *Id.* at 9a. Rather, "[i]f a decree seeks pervasive change in long-established practices affecting a large number of people, and the changes are sought to vindicate significant rights of a public nature, it is appropriate to apply a flexible standard in determining when modification or termination should be ordered in light of either changed circumstances or substantial attainment of the decree's objective." *Ibid.*

Applying that standard, the court first addressed the affirmative action provisions in the decree. It concluded that the district court did not abuse its discretion in vacating those provisions. Pet. App. 10a-12a. Although it was "clear that the 25 percent figure [in the decree] was chosen with reference to the 1970 census figure of a 30 percent minority workforce," the court observed that "[n]evertheless, the decree does not suggest that its purpose is to achieve total parity, and the 25 percent figure, as a numerical goal, is stated in absolute terms, without any suggestion that it is subject to modification." *Id.* at 11a. In addition, "[b]oth the difficulty of achieving [the] 25 percent goal and the likelihood that the percentage of minorities in the blue collar workforce would increase were foreseeable in 1974." *Ibid.* Thus, while the district court "might have had discretion to raise the 25 percent figure as a remedy for not meeting it [a]s originally contemplated," that court "was surely entitled to conclude that such an increase was not required." *Id.* at 11a-12a. And if the percentage goal was not increased, it was proper for the district court to vacate the decree's hiring ratios once the 25% goal was met. *Ibid.*

With regard to the remainder of the decree, the court agreed with the district court "that the decree has served its purpose, and that all of its provisions may be ended." Pet. App. 12a. The court did not "decide that the District Court was required to vacate these additional provisions, only that it was entitled to do so." *Ibid.* The court explained that "[a]pplication of the flexible standard * * * entitles a court of equity to focus on the dominant objective of any decree and to terminate the entire decree once that objective has been reached." *Ibid.*[1]

ARGUMENT

1. The court of appeals erred in concluding that the dominant objective of the consent decree was to achieve the numerical goal of 25% minority representation in the newspaper delivery industry. That interpretation unduly emphasizes one remedial section of the decree to the exclusion of other sections of equal importance. In particular, that interpretation cannot be reconciled with the very first section of the decree which permanently enjoined respondents from discriminating on the basis of race. Pet. App. 123a-124a. On its face, that important prohibition is entirely independent of the provision setting a numerical goal of 25% minority employment and reflects the decree's larger purpose of ending pervasive discrimination in the newspaper delivery industry.

The court of appeals' interpretation of the decree also departs sharply from the normal understanding of the purpose of numerical goals. Under Title VII, such goals

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[1] At the outset of its opinion, the court of appeals had stated its conclusion that the district court "was entitled to vacate the entire consent decree since its essential purpose had been achieved." Pet. App. 2a.

are not ends in themselves. Rather, they are benchmarks to assist in the more fundamental goal of eliminating pervasive employment discrimination. *Local 28, Sheet Metal Workers' Int'l Ass'n* v. *EEOC*, 478 U.S. 421, 448-449, 477-478 (1986) (plurality opinion); *id.* at 486-487 (Powell, J., concurring in part and concurring in the judgment). Under the interpretation adopted by the court of appeals, however, the provisions prohibiting discrimination in the newspaper delivery industry were merely designed to facilitate the achievement of the numerical 25% employment objective. That interpretation of the decree turns Title VII remedial law upside down and elevates the achievement of numerical goals over the purpose of eliminating discrimination. Although parties are free to agree to remedies that a court could not order (*Local 93, Int'l Ass'n of Firefighters* v. *City of Cleveland*, 478 U.S. 501, 525 (1986)), a court should be reluctant to construe a Title VII consent decree in a manner that is so fundamentally at odds with the statute's underlying purpose.

Nothing in the language of the decree in this case shows that the parties were concerned solely or primarily with achieving 25% minority employment and that they had little or no interest in the goal of ending the pervasive discrimination that gave rise to the litigation in the first place. The general statement in the decree (Pet. App. 4a) that its purpose was "to correct the * * * statistical imbalance [in the industry], to remedy and eradicate its effects, and to put minority individuals in the position they would have occupied had the * * * statistical imbalance not existed" does not suggest that the parties did not care about ending the industry's history of pervasive discrimination. Indeed, even the court of appeals recognized that this language could be read to support that broader purpose. *Id.* at 11a.

Because a primary purpose of the decree was to end pervasive discrimination in the newspaper delivery industry, the district court clearly erred (Pet. App. 114a-115a) in treating evidence that respondents were still actively engaged in such discrimination as irrelevant to the decision whether to terminate the decree. Similarly, the court of appeals was wrong (*id.* at 12a) to conclude that the district court had discretion to terminate the decree in the presence of such evidence. The flexibility of a court of equity to dissolve a consent decree does not include authority to dissolve a decree designed to end pervasive racial discrimination without an affirmative showing by defendants that such discrimination has either ceased or become insignificant.[2]

Although the court of appeals erred in approving the district court's dissolution of the consent decree, that error alone does not warrant this Court's review. The court of appeals' decision is case specific; it does not hold that satisfaction of a numerical goal in a consent decree always requires or even justifies that decree's dissolution. Indeed, the court of appeals expressly distinguished the decree in this case from one that

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[2] In some situations, a showing that a numerical goal has been reached might help to prove that pervasive discrimination had ended. Here, however, the decree required respondents to reach their 25% goal by 1979, and the goal was not reached until many years later. By then, the percentage of minorities in the qualified labor pool had increased substantially (to approximately 50%), so that there remained a very substantial disparity between the percentage of minorities in respondents' work force and the percentage of minorities in the qualified pool. Moreover, there is evidence in this case that respondents engaged in numerous instances of intentional discrimination during the life of the decree. Pet. 14-16. In these circumstances, respondents' satisfaction of the 25% goal could not constitute proof that pervasive discrimination had ended.

described its purpose in somewhat broader language. Pet. App. 11a. The holding here approves the district court's exercise of discretion in light of the particular language of the decree in this case. That fact-bound decision, while erroneous, does not conflict with the decision of any other court of appeals and does not appear to raise any issue of general importance.

2. Petitioners urge the Court to grant review to decide whether the standards that this Court announced in *Dowell* and *Rufo* for modifying decrees should apply in cases involving non-governmental defendants. This case, however, is not an appropriate one in which to resolve that question.

In *Swift*, 286 U.S. at 119, this Court stated that "[n]othing less than a clear showing of grievous wrong evoked by new and unforeseen conditions" could justify vacating a decree. In *Dowell* and *Rufo*, this Court held that *Swift's* strict "grievous wrong" standard does not apply when governmental defendants seek to modify a decree. *Dowell*, 498 U.S. at 246-247; *Rufo*, 112 S. Ct. at 757-758. In *Dowell*, this Court held that a finding that a school district "was being operated in compliance with the commands of the Equal Protection Clause of the Fourteenth Amendment, and that it was unlikely * * * [to] return to its former ways" would justify dissolution of a desegregation decree. 498 U.S. at 247. In *Rufo*, this Court held that a governmental defendant may obtain a modification of a consent decree by showing "that a significant change in circumstances warrants revision of the decree." 112 S. Ct. at 760. The court of appeals held that the "flexible" standards announced in *Dowell* and *Rufo* applied in this case, even though respondents are not governmental defendants. Pet. App. 9a-10a.

That holding, however, may not have been critical to the court of appeals' judgment. Because the court of

appeals concluded that respondents had achieved the main purposes of the decree by reaching 25% minority employment, it might well have arrived at the same result in this case even if it had not relied upon *Dowell* and *Rufo*. Accordingly, the question whether the court of appeals erred in relying on those decisions is not squarely presented by this case.

In addition, the court of appeals' holding was that the flexible standards announced in *Dowell* and *Rufo* apply when a decree "seeks pervasive change in long-established practices affecting a large number of people, and the changes are sought to vindicate significant rights of a public nature." Pet. App. 9a. That holding does not conflict with the holding of any other court of appeals. The Seventh Circuit has indicated that a flexible standard applies in all cases. *In re Hendrix*, 986 F.2d 195, 198 (1993). The Sixth and Eighth Circuits have applied the more flexible standard only to cases involving governmental defendants, *Lorain NAACP* v. *Lorain Bd. of Educ.*, 979 F.2d 1141 (6th Cir. 1992), cert. denied, 113 S. Ct. 2998 (1993); *Epp* v. *Kerrey*, 964 F.2d 754 (8th Cir. 1992), but those circuits have not yet addressed whether or to what extent a flexible standard might also apply in cases involving non-governmental defendants. Finally, although the Federal Circuit refused to apply *Rufo* to purely "commercial disputes," it has indicated that *Rufo* applies to cases involving non-governmental "service" institutions, a category that might well include respondents. *W.L. Gore & Associates* v. *C.R. Bard, Inc.*, 977 F.2d 558, 561-562 (1992). The question whether a flexible standard would apply in a case like this one thus remains open in that circuit.

3. Finally, petitioners contend (Pet. 20-22) that the court of appeals' decision is inconsistent with *Dowell*, *Rufo*, and *Freeman* v. *Pitts*, 112 S. Ct. 1430 (1992). In

those decisions, this Court held that a good faith effort to comply with a decree is a prerequisite to obtaining a modification of that decree. *Dowell*, 498 U.S. at 249-250; *Rufo*, 112 S. Ct. at 761; *Freeman*, 112 S. Ct. at 1450. Moreover, in *Freeman*, this Court held that a showing of good faith compliance with one portion of a decree can result in relief only from that specific portion of the decree. 112 S. Ct. at 1445-1446. Because respondents only demonstrated their compliance with one provision in the decree, petitioners contend that the court of appeals erred in approving the dissolution of the entire decree. Pet. 21-22.

Petitioners' argument assumes that achieving 25% minority employment was simply one purpose of the decree. While we agree with petitioners on that point, the court of appeals did not. As we have noted, the court of appeals concluded that achieving 25% minority employment was the essential purpose of the decree. If that premise is accepted, petitioners' showing that they met the 25% goal was sufficient to establish that the decree has served its purpose. Under *Dowell*, such a showing can justify dissolution of a decree. 498 U.S. at 247.

Petitioners' real disagreement is with the court of appeals' interpretation of the decree in this case. While we share that disagreement, that fact-specific issue does not warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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